* **HIGH COURT OF DELHI : NEW DELHI**

\+ **W.P(C) No. 1567 OF 2007**

Judgment reserved on: August 06, 2007

Judgment delivered on: August 24, 2007

M/s. Renaissance Distilleries &
Breweries Ltd. ..... Petitioner
Through: Mr. Arvind Nigam with Mr. Dinesh Kumar, Advocates.

versus

The Government of NCT of Delhi & Ors. ..... Respondent
Through: Ms. Avnish Ahalwat, Advocate for respondent nos. 1 and 2.

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J.

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1. The petitioner has filed this Writ Petition under Article 226 of the Constitution of India to seek a writ in the nature of certiorari thereby quashing the acceptance letter dated 23rd February 2007 issued by respondent No. 1 i.e. the Government of NCT of Delhi to the private respondent No. 3 to 7 whereby the

said respondents have been granted the L-9/CLW-1 License for the wholesale supply of Country Liquor in the National Capital Territory of Delhi for the Licensing Year 2007-2008. The petitioner has further sought a mandamus to direct respondent No. 1 to accept the petitioner's offer dated 5th February 2007 for grant of L-9/CLW-1 license for the said Licensing year.

2. In January 2007, Government of NCT of Delhi invited tenders for grant of L-9/CLW-1 licenses for wholesale supply of Country Liquor for the licensing year 2007-08. The notice inviting tender issued by the Commercial-cum-Special Secretary of Excise enumerated the documents which were to accompany the tenders. The bids were to be submitted by 1 PM on 5th February 2007. Amongst others, the following documents were also required to be submitted alongwith their bids by the tenderers:

> "ii) 'No Dues Certificate in favour of the tenderer issued by the Collector of Excise, Delhi, after the date of this notice'.
>
> x) "No defaulter of dues of VAT Certificate from the Trade and Tax Department of NCT of Delhi." (hereinafter referred to as the VAT certificate)."

3. Clause 6 of the NIT further stated that conditional offers, offers without bank drafts of earnest money, other documents, etc and offers which are not in the prescribed tender form/document, will not be entertained and be summarily

rejected. Tenders received after the stipulated date and time were not to be entertained and were to be rejected.

4. The petitioner submits that it obtained the “No Dues” Certificate from the Excise Department, which was submitted alongwith its bid. There were 11 other parties was participated in the tender process. On 5.2.2007 when the tenders were opened, the bid of the petitioner was found to be the lowest. It is stated that the petitioner offered a bid of Rs.155.86 per case for 20% of the quantity, whereas the next lower rate offered was Rs.162/- per case.

5. It is submitted that the respondent department, with a view to bring down the rates through negotiations, called seven of the bidders to attend the negotiation meeting vide letter dated 14.2.2007 to be held on 15.2.2007. Even though the petitioner’s rates were the lowest, the petitioner was not called for negotiations. It is asserted that the exclusion of the petitioner from negotiation was unjustified and in violation of the CVC Guidelines. As per the guidelines, first five tenderers i.e., L-1 to L-5 ought to have been called for negotiations. The petitioner represented against its exclusion on 15.2.2007 at 8.30 AM and even approached the Finance Minister of Delhi State to redress its grievance. It is further alleged that the Principal Secretary (Finance), who was one of the members of the negotiating

Committee, informed the petitioner that the reason for non consideration of the petitioner's bid was the failure of the petitioner to deposit the Value Added Tax (VAT) and produce the VAT certificate. It is alleged that the Principal Secretary (Finance) required the petitioner to give an undertaking that the unpaid amount of VAT would be paid within 10 days and the petitioner was further assured that he would be allowed to participate in the negotiations to be held on the same day. Accordingly, the petitioner states, it gave the undertaking. Despite the said undertaking, the petitioner was not allowed to participate in the negotiations. It is averred that in the meanwhile, the respondents have negotiated and finalized the rate of Rs.162/- per case as opposed to the petitioner's offer of Rs.155.86 per case.

6. The petitioner alleges that by accepting the higher rate of Rs.162/- per case, the respondent authorities have, in fact, caused a loss to the State Exchequer to the tune of Rs.3,60,00,000/- in the Licensing year 2007-08. The action of the respondent authorities is alleged to be opposed to public interest apart from being arbitrary and illegal.

7. Before us, the submission of the learned counsel for the petitioner is that the requirement in the NIT of submission of the VAT certificate is a non essential condition. It is argued that the Excise Department had floated the tender notice under Rule

32 of the Delhi Liquor License Rules, 1976 (hereinafter referred to as the Rules). Rule 32 of the Rules does not require submission of the VAT certificate by the tenderers for grant of L-9/CLW-1 license for wholesale supply of Country Liquor in the NCT of Delhi. In contradistinction, that certificate is required to be submitted by a tenderer who applies for grant of L-1 license for whole sale supply of Indian Made Foreign Liquor (IMFL) brands in the NCT of Delhi by virtue of Rule 31A of the Rules. Petitioner places reliance on ***Poddar Steel Corporation V. Ganesh Engineering Works & Ors***.(1991) 3 SCC 273 in this regard.

8. It is argued that there were no dues of Excise outstanding against the petitioner on the date on which the petitioner submitted its bid in response to the NIT in question and certificate to that effect was also submitted by the petitioner. The requirement of a VAT certificate was introduced for the first time in the NIT in question, just to oust the petitioner from the bidding process, as the respondent authorities knew that the petitioner was a defaulter in payment of VAT. It is further argued that the excise department of the Govt. of NCT of Delhi is not concerned with the outstanding VAT liability of the bidders, since their only outlook is the realisation of excise dues.

9. The condition that the bidders should submit the VAT certificate in effect means that bidders should have cleared their

VAT dues before the submission of their bids. The requirement of submission of the VAT certificate by the bidders is merely to establish the fact of clearance of VAT dues by the bidder upto the date when the certificate is issued.

10. Before we examine the petitioner's submission that the condition requiring submission of a VAT Certificate was not essential, we may note that the petitioner has not, and could not have challenged the prescription of the aforesaid clause 2(x) read with clause 6 of the NIT, whereunder the bidders were required to submit the said VAT Certificate, and it was stated that offers without, inter-alia, the documents will not be entertained and be summarily rejected. This is so in view of the decision of the Hon'ble Supreme Court in ***Tata Cellular v. UOI***, AIR 1996 SC 11. While laying down the principles relating to the scope of judicial review of administrative decisions and exercise of contractual powers by government bodies, one of the principles deduced by the court was that *"The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract."* In the present case, the petitioner participated in the tender process, fully conscious of the conditions of the NIT, which expressly in unequivocal terms required the submission of the VAT certificate by the bidders and stated that bids not accompanied with the requisite documents

would not be entertained and would be summarily rejected and is now seeking to challenge the rejection of its bid by advancing its own interpretation of the tender conditions.

11. In our view, the petitioner ought to have agitated its point of view in this petition even before participating in the tender process, since it should have been obvious to the petitioner that its bid would be rejected due to non-submission of the VAT certificate. The petitioner cannot challenge the clear and unambiguous terms of the NIT after having participated in the tender process and failing to be considered therein on account of the petitioner not fulfilling the said express condition. Reference may be made to ***India Thermal Power Ltd. V. State of MP & others,*** (2000) 3 SCC 379, paragraph 17 and ***M/s. New Bihar Bidi Leaves Co. & others v. State of Bihar & Others.,*** (1981) 1 SCC 537, Para 48). In our view, the challenge raised in this petition must fail on this short ground.

12. There can be no quarrel with the proposition that non-essential or ancillary/subsidiary requirement in the NIT can and ought to be waived. The test to determine whether a condition is essential or collateral has been stated by the Hon'ble Supreme Court in ***Kanhaiya Lal Aggarwal vs. UOI*** (2002) 6 SCC 315. It says that whether a condition in a tender is essential or collateral is to be ascertained by reference to the consequences of non

compliance thereof. If non-fulfillment of the requirement results in rejection of tender, then it would be an essential part of the tender otherwise it is only a collateral term.

13. Therefore, in the light of the aforesaid position, we now proceed to consider the primary submission of the petitioner that the said condition is non essential, and the bid of the petitioner could not have been overlooked on account of the non submission of the VAT Certificate.

14. Rule 32 of the Rules on which the petitioner places reliance, lays down the procedure to be followed for the grant of, inter-alia, L-9/CLW-1 license by the process of tender. The said rule reads as follows:

> "32. In case the licence is decided to be granted by tender, the following procedure shall be followed:
>
> (1) Tender for the grant of licences shall be invited by the Excise Commissioner after giving not less than 10 days' notice specifying inter-alia-
>
> (a) The conditions to which the tender will be subject;
>
> (b) The number and situation of the shops to be licensed on the basis of tender where applicable;
>
> (c) In the case of licences in Form L-1A or L-9 the minimum and the maximum quantity of liquor required to be made available for sale either during the currency of the licences or during any specified shorter period or periods.

(d) Any other information which in the opinion of the Excise Commissioner may be of use to the intending bidders.

(2) No tender shall be considered unless the earnest money, as prescribed by the Excise Commissioner, has been deposited in a Government Treasury or State Bank of India in favour of the Excise Commissioner or Bank Draft or cash in currency notes is/are attached to each other.

(3) No tender shall be entertained from any person whose name is on the black list or who is otherwise debarred from holding such licences.

(3A) Tenders may be invited for licence fees or, in the case of licensees in Form L-9 or L-1 A, for rates or prices at which the licensee will supply liquor.

(4) A tender shall specify the whole annual licence fee and not the amount of the monthly installment in which it is payable.

(5) A tender from a partnership or a firm shall contain the names of all the partners or the members of the firm, as the case may be. No such tender shall be entertained unless it is signed by all the partners or the members and is accompanied by an attested copy of the partnership deed/firm's constitution. Such attestation shall be by an Executive Magistrate or a Judicial Magistrate of the first class.

(6) The Excise Commissioner may, in his discretion, reject any tender where, in his opinion, the tender and/or any of his partners have formed a pool tending to create an undesirable monopoly of interest.

(7) The Excise Commissioner is not bound to accept the highest tender or any tender at all. When the highest tender is not accepted, and a lower tender is proposed to be accepted, the Excise Commissioner shall record in writing his reasons therefore. No tender shall be accepted without the approval of the Lt. Governor.

(7A) If in the opinion of the Lieutenant Governor, it is necessary for the purpose of achieving uniformity in the rates, that negotiations may be made with the tenderers, he may for that purpose appoint an officer or a committee of officers to negotiate with the tenderers, whose tenders are otherwise in orders. Officer and the Committee shall then negotiate with the tenderers in the ascending order of the tender rates but no tenders shall have a vested right to be called for such negotiations. The negotiations made by the officer or the committee of officers shall be subject to the final decision of the Lt. Governor.

(8) The deposits made by unsuccessful tenderers shall be refunded to them.

(9) (i) Where tenders have been invited for licence fee, the successful tenderer whose tender has been accepted by the Excise Commissioner, shall pay one-fourth of the amount quoted by him plus an amount equal to six months estimated assessed fee in case of licences for foreign liquor within such time as may be fixed by the Excise Commissioner while communicating the decision about the acceptance of the tender to him. The earnest money deposited by him shall be adjusted towards the satisfaction of dues payable by him as aforesaid or as security amount wherever such security is provided.

(ii) Any person whose tender is accepted, whether for licence fee or for rates, shall take all requisite action to complete all formalities required for grant of a licence within seven days from the date of communication of acceptance of his tender and if he does not do so, all deposits made by him shall stand forfeited to the Government and, while the licence may be re-tendered or granted in any other manner, he shall not be entitled to any compensation.

(10) (i) If any person, whose tender has been accepted, fails to make the deposits one-fourth of annual fee (plus an amount equal to six months estimated assessed fee in case of licence for foreign liquor) or if he refuses to accept the licence, the Excise Commissioner may call for fresh tenders, or any deficiency in fee arising as a result thereof together with all expenses incurred in inviting tenders shall be recoverable from the defaulting tenderer in the manner laid down in Section 60 of the Punjab Excise Act, 1914 has in force in the Union Territory of Delhi.

(ii) It shall also be lawful for the Excise Commissioner to forfeit the earnest money of the defaulting tenderer either in part or in full, deposited by the said tenderer.

(11) Where tenders have been invited for licence fee, a licensee shall, by the 7th of the month in which he begins his business under his licence and thereafter by the 7th of every subsequent month, pay in advance one-twelfth of the annual fee till the whole fee is paid. The one-fourth advance paid under sub-rule (2) shall be adjusted at close of the year. He may, however, at any time, pay the whole amount due, if he so wishes.

(12) Where tender money exceeds Rs.1,00,000, it shall be a multiple of Rs.5,000/- and for lesser amount it shall be multiple of Rs.500/-.

(13) Where tenders have been invited for licence fee, if the Excise Commissioner is of the opinion that no suitable tender is forthcoming, he shall, with the previous –

Sanction of the Lt. Governor, resell the licence by auction.

(14) If it is not considered expedient to accept the highest or the lowest tender, as the case may be, the Excise Commissioner shall refer the matter to the Lt. Governor as to whether-

(a) The licence be auctioned; or

(b) The shop to which the licence relates be closed either permanently or till a person willing to take it up at the minimum fee comes forward; or

(c)The vend in, the shop to which the licence relates be carried on by a vendor who may be paid commission on sales.

(15) When a licence has been cancelled, the Collector may resell it by public auction or by inviting fresh tenders or by private contract and any deficiency in fee and all expenses of such resale or attempted resale shall be recoverable from the defaulting licensee in the manner laid down in Section 60 of the Punjab Excise Act, 1914, as in force in the Union Territory of Delhi. The Collector shall communicate the result of such resale in a statement, in duplicate to the Excise Commissioner. If the amount realized from the original licensee including the initial deposit of one-fourth of the annual fee and the amount bid by the incoming

> licensee together are less than the amount previously tendered by the original licensee together with the expenses incurred, if any, in connection with resale, the deficiency, shall be recovered from the original licensee. If these amounts together are more than the amounts previously tendered, no refund shall be made to the original licensee."

15. The submission of the petitioner is that the said rule prescribes the various conditions to be complied with by the tenderers while submitting their bids for the grant of, inter-alia, L-9/CLW-1 license. However, there is no requirement for submission of a VAT Certificate. It is argued that the conditions prescribed in the NIT, which are not statutorily prescribed in Rule 32, cannot be insisted upon, or become a basis for rejection of the bid at the threshold.

16. We cannot agree with the submission of the petitioner. Rule 32 lays down the procedure to be followed for grant of, inter-alia, the L-9/CLW-1 license through the tender process. It states that the tender is to be invited by Excise Commissioner, by giving not less than 10 days notice specifying, inter-alia, ***'the conditions to which the tender will be subject'***. The Rule does not lay down the conditions by themselves, to which the tender may be subject and leaves it to the Excise Commissioner to specify those conditions. It is in the exercise of the said power, that the Excise Commissioner issued the NIT in question

containing, inter-alia, clause 2(x) as aforesaid. If the submission of the petitioner were to be accepted, it would mean that even the other conditions were not essential and could not be insisted upon for compliance by respondents authorities. These conditions, inter-alia, require submission of :-

> "(i) "No Dues Certificate" in favour of the tenderer issued by the Collector of Excise, Delhi after the date of this Notice.
>
> (ii) An affidavit, duly attested by a Magistrate declaring that the information given in the tender form is true and correct and that no fact has been concealed therefrom.
>
> (iii) True attested copy of the valid distillery licence or bottling plant licence issued by the Competent Authority.
>
> (iv) Documents showing the permitted installed capacity for the manufacture of country liquor.
>
> (v) Statement indicating the actual production and supply of country liquor during the last five years, duly authenticated by the concerned Excise Commissioner of the State in which the distillery/bottling plant is situated.
>
> (vi) "No Dues and Credibility" certificate regarding past performance of production and supply from the Excise Commissioner of the State in which the distillery/bottling unit is situated.
>
> (vii) Consent of the Excise Commissioner of the State where distillery/bottling plant is situated for supply of spirit from that State of the national Capital Territory of Delhi in

which the capacity of the distillery/bottling plant should be clearly mentioned.

(viii) A statement indicating the maximum quantity of country liquor that can be supplied to Delhi by the tenderer from each its units."

17. Without the aforesaid information, the respondent authorities cannot even be expected to take a rational decision on the competence and suitability of the various bidders.

18. The grant of licenses under the Rules can be by the process of auction, or through the tendering process. While Rule 32 prescribes the procedure for tendering, Rule 31 prescribes the procedure for auctioning of the licenses. The Excise Commissioner is entitled to specify, inter-alia, the conditions to which the auction will be subject [Rule 31(2)(a)]. Rule 31(4)(b) lays down the details of the documents that are required to be furnished by the bidders at the auction. Clause (vii) of the said sub-rule is relevant, and the same reads as follows:

"31.(4) No person shall be allowed to bid for a licence unless-

a) … … …

b) He has furnished the following documents:

i) … … …

ii) … … …

iii) … … …

iv) … … …

v) … … …

vi) … … …

vii) A no due certificate from the appropriate assessing authority if the intending bidder is or is interested in the business of a dealer registered under the Delhi Sales Tax Act, 1975 in respect of dues realisable under the Sales Tax laws in force in Delhi upto the last date of the preceding the date of the auction for which such dealer has been assessed;"

19. Firstly, we may notice that the language of Rule 31(4) begins with a peremptory clause. Therefore, for the purpose of being eligible for participating in an auction for acquiring licenses under the Rules, the bidders have to comply with the conditions specified in Rule 31(4). It does not stand to reason that the condition requiring furnishing of the documents specified in Rule 31(4) is mandatory for purpose of granting licences by the process of auction, and not by the process of tendering. Rule 31 applies to all licences under the Rules, including L-9 licenses.

20. Counsel for the respondent submits that the aforesaid submissions of the petitioner are also in the teeth of The Delhi Intoxicants License and Sale Rules, 1976 (hereinafter referred to as the Intoxicants Rules) framed under the Punjab Excise Act, 1914 as applicable to Delhi. Under Rule 7 of the Intoxicants Rules, it is mandated that a license for the vend of liquor and/or drugs shall not be given to, inter-alia, *"any person interested in the*

business of any firm registered under the Law relating to Sales Tax in Delhi, and dealing in any intoxicant if such firm is defaulter of dues under the said law."

21. Explanation appended to Rule 7 enlarges the scope of the said restriction. It reads as follows :

> "For the purposes of this rule. "person interested in the business of the holder of a licensee or a firm" includes every person interested in such business as a member, director, partner or agent."

22. We may note that the VAT is imposed in lieu of Sales Tax and consequently the said provisions clearly bars the grant of license to a defaulter of tax in the nature of the Sales Tax, which is now called VAT. To this, the submission of the petitioner is that Rule 7 of the Intoxicants Rules does not apply to liquor licences for wholesale supply, and that it applies only to a licence for a "*vend*". It is contended that the L-9/CLW-1 licence in question is not a licence for a "*vend of liquor*." The submission of the petitioner that the expression "vend" connotes only a retail shop and does not cover wholesale licence operations does not appear to be correct. A perusal of the Rules, such as Rule 34(11) shows that the Rules also describe the L-9 licence as one *"for the wholesale vend of country liquor."* Similarly, Rule 1, which describes the class of licences that may be granted and renewed by the authorities, describes the licence in Form L-9 as "*wholesale*

vend of country liquor." The express "*vend*" is therefore more generally used so as to mean "*to sell*". It does not mean a retail vend only. Even if the submission of the petitioner, that the Intoxicant Rules do not apply to L-9 licences is assumed to be correct, without going into the question whether the Intoxicants Rules squarely apply to a wholesale vend licensee holding a L-9/CLW-1 licence or not, what can be said is that the clearance of the VAT dues is an essential condition for grant of a retail liquor vend. If this is so, it does not stand to reason why a similar condition cannot be prescribed by the Excise commissioner in the NIT issued for granting L-9/CLW-1 licence for a wholesale vend of country liquor. There was, therefore, sufficient guideline and justifications for the Excise Commissioner to lay down clause 2(x) in the NIT in question, in exercise of his power under Rule 32(1)(a). The argument based on Rule 31A is therefore misconceived and is rejected.

23. In the present case, clause 6 of the NIT clearly stated that offers without the *"other documents etc. and offers, which are not in the prescribed tender form/document, will not be entertained and summarily rejected*." The "*other documents*" referred to, necessarily relate to the documents enumerated in clause 2 of the said NIT. Consequently, clause 2(x) which requires

the submission of the VAT certificate by the bidders is an essential condition, which could not be waived.

24. We also cannot accept the submission of the petitioner that since the tender in question is floated by the Excise Department of Government of NCT of Delhi, which has no concern with the outstanding dues of VAT, said condition could not have been imposed in the NIT, and therefore it should be read as a non-essential condition.

25. It is well known that there is no fundamental right to manufacture or trade in liquor and other noxious items in view of their ill effects on the society. The State still grants licenses for manufacture and trade in liquor primarily to generate revenue for the State. Even VAT is a tax levied and collected by the State to enhance its revenue which is needed by the State to run the administration and carry out its obligations. It is therefore wrong to contend that the State, while acting through one of its limbs i.e. the excise department cannot prescribe a condition that the applicant for a liquor license should have no outstanding sales tax/VAT dues. Even otherwise, the State is not obliged to deal with a person who may be a defaulter in payment of taxes. A defaulter in payment of one kind of tax can be reasonably assumed to have the propensity to conduct itself in the same manner in relation to other similar liabilities in future. The State

can choose not to deal with such a defaulter. In our view, there is nothing unreasonable about it.

26. From the above discussion, it follows that the condition prescribed in the NIT in question under clause 2(x), is in fact an eligibility condition and since the petitioner did not fulfill the same, he had no right to be considered in the tender process in question. When the bid of the petitioner was opened, the shortcoming in its bid and its ineligibility was discovered. If the respondent authorities are directed to entertain the petitioner's bid, it would lead to denial of opportunity to others similarly circumstanced, who might have been interested in submitting their bids for the tender in question, and who did not do so on account of, inter-alia, condition No. 2(x) in the NIT. This is another reason why we find no merit in this petition. (See ***G.J. Fernandez Vs. State of Karnataka, 1990 (2) SCC 488; R.D. Shetty vs. Airport Authority of India, AIR 1979 SC 1628).***

27. In our view, the bid of the petitioner was rightly not considered by the respondent. The argument of the petitioner that he was the lowest bidder and that the State Exchequer would have gained additional revenue of Rs.3.6 crores for the year in question had its bid been accepted, though attractive, is without any merit. Since the petitioner was not eligible, and its bid was non-responsive, the rates offered by the petitioner are of no

consequences and cannot be looked at for any purposes. Pre qualification/eligibility conditions are essential conditions, non fulfillment of which result in the rejection of the tender. (See ***G.J. Fernandez (Supra); Kanhaiya Lal Aggarwal (supra)).*** The tender conditions must be adhered to and followed by the bidders scrupulously. We may only refer to the decisions of the Hon'ble Supreme Court in ***W.B. State Electricity Board vs. Patel Engineering*** (2001) 2 SCC 451

28. To satisfy ourselves, we had asked the respondents to produce the relevant departmental file. We have gone through the same and do not find any irregularity in the award of the licences to the private respondents @ Rs.162/- per case. The negotiation committee had first called M/s. Queen Distt & Bottlers (P) Ltd for negotiation, since it had quoted a rate of Rs.162/- per case, which was the lowest valid bid. He justified the quoted rate and did not agree to bring it down any further on the ground that import of ethanol/industrial alcohol from Brazil had stopped. Consequently, the rates of molases and rectified spirit in the domestic market had gone up and he stated that the rates may go up further in the coming months, in view of the mandatory use of ethanol to the extent of 5% in petrol all over India. It is noticed that while a few other bidders agreed at the time of negotiation to reduce their rates to Rs.162/- per case, two of the bidders even

refused to reduce their quote rates of Rs.167/- per case and Rs.167.50 per case of country liquor. Consequently, they were not awarded any quantity for supply and all the suppliers, after negotiations, agreed to supply at the rate of Rs.162/- per case. From this it appears that the rate accepted by the respondents was not excessive and there seems to be no irregularity in the award of the L-9 licences by the respondent authorities.

29. In view of the aforesaid we find no merit in the petition and dismiss the same.

VIPIN SANGHI, J.

A.K.SIKRI, J.

August 24, 2007
P.K. BABBAR